Calendar No. 120

106TH CONGRESS *1st Session*	SENATE	REPORT 106–51

SATELLITE TELEVISION ACT OF 1999

REPORT

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 303

together with

MINORITY VIEWS

MAY 20, 1999.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
69–010 WASHINGTON : 1999

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED SIXTH CONGRESS

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(II)

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SENATE

REPORT
106–51

SATELLITE TELEVISION ACT OF 1999

MAY 20, 1999.—Ordered to be printed

Mr. MCCAIN, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 303]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 303) "A bill to amend the Communications Act of 1934 to enhance the ability of direct broadcast satellite and other multichannel video providers to compete effectively with cable television systems, and for other purposes", having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

The purpose of the bill is to amend the Communications Act of 1934 to promote competition in the provision of multichannel video service while protecting the availability of free, local over-the-air television.

BACKGROUND AND NEEDS

Cable rates have increased more than 20 percent since the enactment of the 1996 Telecommunications Act, far exceeding other consumer price increases. Even the Federal Communications Commission (FCC) has recognized that cable rates have risen excessively in recent years notwithstanding the agency's implementation of cable rate regulation rules.

Regulation of most tiers of cable television service ceased on April 1, 1999. This regulatory "sunset" date was enacted into law based on the belief that, by that date, cable television operators would face competition from a number of other multichannel video services, including direct-to-home satellite television, wireless cable, and telephone company-provided video dialtone systems.

This anticipated competition failed to develop as expected. Technical and operational problems resulted in financial difficulties for wireless cable systems, telephone companies concentrated their efforts on voice and data delivery rather than on video, and direct-to-home satellite service struggled due to a series of statutorily-imposed limitations on the nature and terms of the service it could offer.

Despite these adverse occurrences, the cable rate regulation sunset took place as required by statute on April 1. Therefore, under current circumstances, most cable television systems have become virtually unregulated providers of a monopoly service, with unconstrained power to raise consumer rates due to the lack of an effectively competitive alternative provider of multichannel video service.

Recognizing this fact, the cable industry has volunteered to hold future subscriber rate increases to around 5 percent annually. This, however, would still be more than twice the projected inflation rate, and no voluntary commitment, however sincerely intentioned, can actually be enforced.

Return to a prescriptive rate regulation regime would not be a satisfactory alternative. Experience shows that cable rate regulation is ineffective in holding cable rates down without also hurting investment in cable service. In 1992 the FCC reduced cable rates 17 percent and imposed limits on subsequent rate increases. Investment in programming and in cable plant improvements was immediately and sharply curtailed. Total capital investment plunged from $8.17 billion in 1989 to $1.9 billion in 1993. In contrast, with rate deregulation slated to take effect on April 1, capital flow from debt, equity, and other sources has increased 25 percent each year since 1996. And because many cable systems are making the substantial investment needed to provide high-speed cable modem service, reimposition of rate regulation now would impede cable's capital flow at precisely the time it is most needed.

Conversely, experience shows that competition is effective in constraining cable rates without harming cable service. In fact, it has been shown to produce improved service at lower rates. Testimony before the Committee last year showed that head-to-head competition between cable systems typically caused the incumbent cable operator to increase the number of channels offered while cutting monthly rates dramatically, in one case almost in half. Effective competition from other providers of multichannel video service remains the only workable antidote to cable rate increases.

Direct-to-home satellite service, commonly referred to as Direct Broadcast Service (DBS), [1] is currently the best potential competitor to cable television. DBS systems are the fastest-growing con-

[1] For purposes of this report, unless otherwise indicated, the terms "direct-to-home satellite service", "DBS", and "satellite television" are used interchangeably and synonymously.

sumer electronics product in history: the number of DBS subscribers jumped an astonishing 97 percent in 1996 and another 30 percent the following year. However, despite this growth, some current statutes and regulations impede DBS's ability to compete with cable.

Satellite television companies are prohibited under the terms of the Satellite Home Viewer Act (SHVA) and the Copyright Act from providing their subscribers with signals from local network stations as a component of their satellite television service. Cable television providers, however, face no such prohibitions. They can, and do, provide local television stations to their customers.

Direct-to-home satellite service providers' inability to offer local television stations as part of an integrated service package puts it at a significant competitive disadvantage to cable television service. When the FCC surveyed people who "investigated" DBS systems but did not buy them, 55 percent of these people reported that they did not buy a DBS system because of a lack of local television networks. Therefore, to compete effectively with cable television systems, DBS must be allowed to provide local television stations to subscribers.

Under current law, satellite television providers are also prohibited from providing distant network signals to a subscriber unless that subscriber resides in an area considered to be "unserved" by the local television station. "Unserved" areas are in turn defined as being those beyond the local television station's predicted Grade B contour.

The area closest to the television station is referred to as the station's "Grade A" contour. This area is where the television station's over-the-air signal strength is likely to be strongest and is the core of the local television station's market.

The Grade B contour extends beyond the Grade A contour. The Grade B contour was adopted by the FCC in the 1950's to prevent interference between two television stations at the outer limits of their signal coverage areas. It was not intended to define whether a given consumer actually receives a satisfactory television signal. As a result, satellite television subscribers within a station's Grade B contour can find their off-air reception unsatisfactory, yet still be ineligible to receive distant network signals under the terms of SHVA.

As a result, many consumers who subscribed to direct-to-home satellite service believed that, because they got poor reception of their local stations off-air, they lived in an "unserved" area and were entitled to receive distant network signals from their satellite television provider. It has been estimated that over 2,000,000 satellite television subscribers received distant network signals although they resided in the local television station's predicted Grade A and Grade B contours, and therefore were ineligible to receive them under the terms of SHVA.

In 1997 and 1998, a number of lawsuits were brought under SHVA by broadcasters against satellite carriers, alleging that the satellite carriers were distributing the signals of distant network-affiliated television broadcast stations to subscribers that were not unserved households within the meaning of SHVA. Perhaps the most far-reaching of these was brought before the United States

District Court for the Southern District of Florida in Miami by CBS, Fox, and several affiliates against PrimeTime 24.

Finding that PrimeTime 24 had willfully provided distant network programming to served households in violation of SHVA, the Miami court issued a preliminary and, later, a permanent injunction ordering PrimeTime 24 not to deliver CBS or Fox television network programming to any customer living in a "served" household. The court further enjoined PrimeTime 24 from providing distant network signals to any house predicted by a computer model to be served without first either: (1) obtaining the written consent of the affected stations; or (2) providing the affected station with copies of a signal intensity test showing that the household in question is actually unserved.

The preliminary injunction took effect on February 28, 1999, and the permanent injunction was to have taken effect on April 30, 1999. The preliminary injunction has resulted in the termination of network signals to the estimated 700,000 to one million subscribers nationwide who subscribed to PrimeTime 24 after the networks filed their lawsuit on March 11, 1997. The permanent injunction, which applies to the PrimeTime 24 customers who subscribed before March 11, 1997, could affect an additional 1.5 million subscribers nationwide. The total number of PrimeTime 24 subscribers affected by the Miami injunctions could therefore reach 2.2–2.5 million.

In a similar lawsuit, a federal district court in North Carolina ruled against PrimeTime 24, and in favor of a local ABC affiliate. This court found a pattern and practice of willful copyright infringement, and therefore enjoined transmission of ABC network programming within the Raleigh, North Carolina region. PrimeTime 24 has provided network services to as many as 35,000 households in the ABC affiliates Raleigh/Durham market.

In addition to the PrimeTime 24 proceedings, several other lawsuits have been filed by broadcasters and satellite carriers in the federal courts. In Amarillo, Texas, an NBC affiliate has sued PrimeTime 24 in federal district court. EchoStar, another satellite carrier, filed suit against the networks and network-owned or affiliated stations in a federal district court in Colorado, asking the court for a declaratory ruling that it is not in violation of SHVA. The broadcast interests have in turn filed a suit against EchoStar before the district court in Miami, and the Miami court has joined EchoStar in the Miami proceeding.

In July and August 1998, EchoStar and the National Rural Telecommunications Cooperative filed petitions with the Federal Communications Commission asking the FCC to take various actions with respect to its definition of Grade B intensity. Specifically, these parties asked the Commission to: (1) adjust the values of Grade B intensity to better reflect which households actually receive adequate signals; (2) endorse a predictive model arguably more accurate than that adopted by the Miami court; and (3) revise its procedures for measuring broadcast signal strength at the home. These proposals were opposed by the broadcast industry.

The FCC conducted a rulemaking and received comments from various interested parties. In January 1999, the FCC released its Grade B Order, in which it made several decisions with respect to

Grade B intensity. The FCC found, first, that it has no authority to adopt a higher value for Grade B intensity specifically for SHVA purposes. Second, it adopted new testing procedures for measuring television signal intensity at individual households. Third, the FCC endorsed the so-called Individual Location Longley-Rice (ILLR) model for predicting whether or not individual households can receive signals of Grade B intensity. Finally, it identified several options for improving SHVA and the Communications Act to better serve customers, including: confirming that copyright law allows satellite companies to provide local television stations to local markets; finding a better, but still objective, standard for determining which households are unserved; repealing the 90-day waiting period for former cable customers; and providing for a clear statutory acceptance of predictive models and loser pays mechanisms.

While the FCC's actions were helpful in resolving certain technical questions with respect to the implementation of its Grade B standard, and the Miami federal court modified its injunction orders to reflect the rulings of the FCC, the FCC itself acknowledged that its action could not definitively resolve the problems associated with the implementation of SHVA. Indeed, in its Notice of Proposed Rulemaking, the FCC noted:

> The SHVA limits the proposals we can make to address the petitions. Further, we do not appear to have the statutory authority to prevent most of PrimeTime 24's subscribers from losing their network service under the Miami preliminary injunction (and under a possible permanent injunction). The evidence in the Miami and Raleigh court cases strongly suggests that many, if not most, of those subscribers do not live in unserved households under any interpretation of that term.

Directelevision and the networks have recently announced an agreement that incorporates several of the standards announced in the FCC's Grade B Order. This agreement settles litigation before the Miami federal court, under which the networks had obtained a restraining order imposing on Directelevision the court's earlier PrimeTime 24 injunctions. Under the agreement, Directelevision will temporarily restore distant CBS and Fox network signals to its estimated 700,000 customers who lost network service on February 28. However, subscribers predicted (using the FCC's ILLR predictive model) to receive a Grade A signal would be disconnected from distant network service on June 30, 1999. Those predicted to receive a Grade B signal will have distant network service cut off on December 31, 1999. These cut-off households can have their service restored if actual signal measurements show them to be unable to receive a Grade B signal. The settlement also requires Directelevision to provide its cut-off subscribers a substantial discount on outdoor over-the-air antennas.

While it may serve as a partial stop-gap measure, that agreement does not lessen the need for congressional action to avoid the disenfranchising of millions of consumers. This agreement does not change the fact that, as a result of the litigation, millions of satellite television subscribers stand to lose the distant network stations that they have enjoyed receiving for some time. Many will be required to go to the trouble and expense of installing off-air antennas to improve their reception of local television signals. For those satellite television subscribers living at the fringes of the predicted Grade B contour, these measures may still not allow for reception of television signals that these viewers consider acceptable.

The direct-to-home satellite service providers argue that consumers should not be arbitrarily deprived of channels that enable them to enjoy decent network television signals and more program options, and whose carriage has not appeared to injure local television stations. Many consumers agree. However, broadcasters argue that satellite television companies should not be rewarded for breaking the law, that the Grade B contour does in fact predict adequate television service, that satellite carriage of distant network stations is, in fact, harming local network television stations, and that local stations give television subscribers sufficient access to network programming.

LEGISLATIVE HISTORY

S. 303, the Satellite Television Act of 1999, was introduced by Senator McCain on January 25, 1999, and referred to the Committee on Commerce, Science, and Transportation. A full Committee hearing was held on the bill on February 23, 1999. By a vote of 12-8 on March 10, 1999, the Committee ordered S. 303 reported to the Senate with an amendment in the nature of a substitute.

SUMMARY OF MAJOR PROVISIONS

This bill removes statutory impediments to direct-to-home satellite service providers' ability to compete with cable television. This will benefit consumers by increasing the competitive pressures on ever-escalating cable rates. The bill's approach recognizes the legitimate but competing interests of the satellite television operators and the local television stations and strikes a balance between them. It also affords satellite television subscribers who face losing their distant network signals sufficient time to install off-air reception devices or secure necessary authorization to continue receiving them.

The bill authorizes direct-to-home satellite service providers to offer their subscribers local television station broadcasts. Providing local stations will enable satellite television operators to offer a service package combining broadcast and nonbroadcast channels comparable to that offered by cable television operators, thus allowing satellite television to compete more effectively with incumbent cable television systems.

To assure that satellite television subscribers have the same access to local off-air television stations as cable television systems, the bill would also require direct-to-home satellite service providers to comply with the must-carry rules that apply to cable television operators no later than January 1, 2002.

To implement a better way of determining whether prospective satellite television subscribers receive a Grade B-strength signal from a local television station, the bill requires the use of the ILLR methodology. For those consumers who may disagree with an ILLR measurement showing they receive Grade B service, the bill sets out the elements of a consumer-friendly waiver process and directs the FCC to complete a single rulemaking within 90 days to adopt implementing rules. These provisions will give consumers who perceive their off-air local television reception to be unsatisfactory a timely way to have their concerns addressed.

With regard to satellite television subscribers who are currently receiving distant network signals inconsistent with the terms of SHVA, the bill allows this distant signal carriage to continue until December 31, 1999. This will allow additional time for consumers to be tested under the ILLR methodology, the FCC to develop its waiver process, and for consumers to seek a waiver.

Local network affiliates argue strenuously that this existing distant signal carriage is harming them. However, notwithstanding a series of hearings the Committee has had on this issue, they have failed to present convincing evidence to show that the current degree of distant signal carriage poses any realistic threat to the maintenance of a healthy, local over-the-air broadcasting system. We therefore find that the interest of satellite television consumers in not being suddenly and arbitrarily deprived of existing service outweighs the interests of local broadcasters in summary deletion.

After December 31, 1999, satellite television consumers residing in a local network affiliate's Grade A contour will not be eligible to receive distant stations affiliated with the same network unless an ILLR analysis shows that an individual consumer is in reality unserved or unless the consumer receives a waiver from the local network station. As stated previously, the Grade A contour is commonly considered to be the core of the local station's market. Just as important, it is the area where signal reception is normally very good, and where local audiences are more oriented towards local stations and less likely to need distant signals in order to receive network television service. On balance, therefore, we find that at the end of the current year subscribers in this area whose reception is Grade B or better and who do not receive waivers grandfathering the distant station carriage would not be materially harmed by the cessation of distant signal carriage.

After December 31, 1999, satellite television consumers residing in a local network affiliate's predicted Grade B contour may continue to receive distant network signals. These subscribers, unlike those within the Grade A contour, are not in the core of the local station's market and are more likely to experience inadequate off-air reception. It is estimated that the majority of illegal distant signal carriage is occurring within the Grade A contour, not the Grade B contour. Therefore, given the absence of any demonstrable harm to local broadcasting from illegal signal carriage in both the Grade A and Grade B contours, the Committee finds it unlikely that substantial harm will occur if distant signal carriage is permitted to continue to the minority of DBS subscribers receiving it who reside within the Grade B contour.

Nevertheless, the Committee remains aware that, notwithstanding the failure of local broadcasters to demonstrate harm as a general matter, there may be individual stations or markets where the continuation of distant network signal carriage even within the Grade B contour could cause cognizable harm to a local affiliate. To assure that we have struck the correct balance, the bill directs the FCC to institute rulemaking proceedings to examine whether distant signal carriage within this outer-market area should be subject to any of its existing program exclusivity rules.

Direct-to-home satellite service providers have argued that the imposition of exclusivity rules on their distant network signal carriage would be onerous at best and impossible at worst. While the precise nature and extent of these difficulties has not been determined, the Committee does not find it necessary to do so. The Committee finds that the local broadcasters' failure to produce any verifiable evidence that existing distant network signal carriage is causing substantial harm warrants our not imposing these requirements in the legislation itself, but rather requiring the Commission, as the expert agency, to impose any such requirements.

In view of the lack of evidence of existing harm to broadcasters, and the possibility that imposing such requirements on satellite carriers could seriously impact their operations, the Commission's rulemaking authority is carefully circumscribed. The bill states that the Commission may not impose any such rules unless it finds it technically and economically feasible to do so, and is otherwise required by the public interest.

The bill continues to allow all consumers outside the Grade B contour, i.e. the unserved areas, to continue to receive distant network signals. Because DBS subscribers in these areas by definition do not receive off-air service from one or more local network stations, distant network signal carriage in unserved areas would not be subject to any exclusivity rules the FCC might ultimately adopt.

CONSTITUTIONAL ANALYSIS

The bill does not create any new constitutional issues. The Supreme Court has already ruled that must-carry rules are constitutional. (Turner Broadcasting vs. The Federal Communications Commission, 520 U.S. 180, 137 L. Ed. 2d 369, 117 S.Ct. 1174 (1997)). Specifically, the Supreme Court held that the "must-carry" provisions of the Cable Television Consumer Protection Act of 1992 are consistent with the free speech guarantees of the federal Constitution's First Amendment. The court recognized that content-neutral regulations are subject to a less rigorous intermediate scrutiny test because content-neutral regulations do not pose the same inherent dangers to free expression as content-based regulations. The Court held that the "must-carry" provisions advanced important government interests such as preserving the benefits of free over-the-air local broadcast television, and did not burden substantially more speech than was necessary to further those interests.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 12, 1999.

Hon. JOHN MCCAIN,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 303, the Satellite Television Act of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Hadley (for federal costs), Hester Grippando (for revenues), and Jean Wooster (for the private-sector impact).

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 303—Satellite Television Act of 1999

Summary: S. 303 would allow a local broadcast station to require, by January 1, 2002, satellite carriers that serve customers in its market to transmit its signal. (Satellite carriers are companies that use satellite transmissions to provide television signals directly to consumers.) This provision is similar to the requirements now faced by the cable industry. S. 303 would require satellite carriers that knowingly and willfully provide distant network signals to customers in violation of the Communications Act of 1934 to forfeit $50,000 per day per violation. Also, the bill would require the Federal Communications Commission (FCC) to conduct several rulemakings and issue a report.

As of April 30, 1999, a permanent injunction issued by a federal district court will prohibit Prime Time 24 from transmitting CBS and FOX network broadcasts to about two million customers. However, S. 303 would allow Primetime 24 to transmit CBS and FOX programs to those customers through December 31, 1999.

CBO estimates that enacting S. 303 would increase revenues from royalty fees paid by Prime Time 24 by about $3 million in 2000. With higher royalty collections, the payments to copyright holders would also be higher under S. 303, by an estimated $3 million over the 2000–2004 period. The bill also would increase forfeiture payments to the government, but CBO estimates that such payments would be less than $500,000 each year. Because S. 303 would affect both revenues and direct spending, it would be subject to pay-as-you-go procedures. Assuming availability of appropriated funds, CBO estimates implementing S. 303 would cost the FCC less than $500,000 in 2000.

S. 303 would impose a private-sector mandate, as defined by the Unfunded Mandates Reform Act (UMRA), on satellite carriers. The cost of the mandate would not exceed the annual threshold, established by UMRA, for private-sector mandates ($100 million in 1996, adjusted for inflation). S. 303 contains no intergovernmental mandates as defined in UMRA and would impose no costs on state, local or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 303 is shown in the following table. The costs of this legislation fall within budget function 370 (commerce and housing credit).

	By fiscal year, in millions of dollars—					
	1999	2000	2001	2002	2003	2004
REVENUES AND DIRECT SPENDING [1]						
Receipts and Spending Under Current Law:						
Estimated Revenues [2]	244	185	118	112	107	101
Estimated Budget Authority [3]	272	281	219	142	131	121
Estimated Outlays	209	207	259	264	220	182
Proposed Changes:						
Estimated Revenues	0	3	([4])	([4])	([4])	([4])
Estimated Budget Authority	0	3	([4])	([4])	([4])	0
Estimated Outlays	0	0	1	0	2	0
Net Increase or Decrease (−) in Surplus	0	3	−1	([4])	−2	([4])
Receipts and Spending Under S. 303:						
Estimated Revenues [2]	244	188	118	112	107	101
Estimated Budget Authority [3]	272	284	219	142	131	121
Estimated Outlays	209	207	260	264	222	182

[1] In addition to the effects shown in the table, S. 303 would increase spending subject to appropriation by about $500,000 in fiscal year 2000.
[2] Includes royalty fee collections from cable television stations, satellite carriers, and digital audio devices.
[3] Payments to copyright owners include interest earnings on securities held by the Copyright Office.
[4] Less than $500,000.

Basis of estimate: For purposes of this estimate, CBO assumes the bill will be enacted by June 30, 1999. CBO also assumes that payments from the federal government to copyright holders for satellite transmissions would follow historical patterns.

Revenues

Pursuant to the Satellite Home Viewer Act of 1988, satellite carriers pay a monthly royalty fee for each subscriber to the U.S. Copyright Office for the right to retransmit network and superstation signals by satellite to subscribers for private home viewing. The Copyright Office later distributes the fees to those who own copyrights on the material retransmitted by satellite. Under current law, satellite carriers send payments to the U.S. Copyright Office in January for those fees accrued during the previous six months. The requirement for satellite carriers to pay royalty fees is set to expire on December 31, 1999, so the last payment will be in January 2000.

S. 303 would allow the PrimeTime 24—a satellite carrier—to retransmit the signal of a distant station, which is a CBS affiliate, and a Fox network signal to about two million customers. PrimeTime 24 entered into a private contract with Fox, so PrimeTime 24's transmissions of the Fox signal are not subject to royalty fees. Thus, under S. 303, PrimeTime 24 would pay the royalty fee for each of the two million customers that would receive the CBS affiliate's signal each month. Based on information from the satellite industry, CBO estimates that revenues from that royalty fee would be about $3 million in 2000.

S. 303 also would require satellite carriers that knowingly and willfully provide distant network signals to customers in violation of the Communications Act of 1934 to forfeit $50,000 per violation. Such forfeiture payments are recorded as governmental receipts (revenues). Based on information from the FCC, CBO estimates that any such receipts would be less than $500,000 in any year.

Payments to copyrights holders

After review by an arbitration panel, royalty fees are paid by the federal government to copyright owners, along with accrued interest earnings; therefore, S. 303 would result in additional spending. Historical spending patterns indicate that copyright holders may receive the fees and interest up to 10 years after the Copyright Office has collected the revenues. CBO estimates that most of the $3 million in additional royalties would be disbursed between 2001 and 2003.

Spending subject to appropriation

S. 303 would require the FCC to conduct four rulemaking proceedings concerning technical and business relationships between satellite carriers and local broadcast stations. The bill also would require the FCC to report on methods for facilitating the delivery of local signals in local markets, especially small markets. Based on information from the FCC, CBO estimates that implementing S. 303 would cost the commission less than $500,000 in 2000, subject to the availability of appropriated funds.

Pay-as-you-go considerations: The Balanced Budget and Emergency Deficit Control Act sets up pay-as-you-go procedures for legislation affecting direct spending or receipts. The net changes in outlays and governmental receipts that are subject to pay-as-you-go procedures are shown in the following table. For the purposes of enforcing pay-as-you-go procedures, only the effects in the current year, the budget year, and the succeeding four years are counted.

	By fiscal year, in millions of dollars—										
	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Changes in outlays	0	0	1	0	2	0	0	0	0	0	0
Changes in receipts	0	3	0	0	0	0	0	0	0	0	0

Estimated impact on State, local, and tribal governments: S. 303 contains no intergovernmental mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimated impact on the private sector: S. 303 would impose a private-sector mandate, as defined by the UMRA, on satellite carriers. The cost of the mandate would not exceed the annual threshold, established by UMRA, for private-sector mandates ($100 million in 1996, adjusted for inflation).

Satellite carriers would be required to use the Individual Location Longley-Rice (ILLR) methodology to determine if a new subscriber would be eligible to receive distant network signals. In February 1999, the FCC recommended the use of this model to determine the signal strength for a specific house rather than a general area. This mandate would affect five satellite carriers. Based on information from those carriers, CBO expects that most of them will be using the ILLR model by the time this bill would be enacted.

Those who have not implemented the model would be required to do so. CBO estimates that the additional costs that the satellite carriers would incur would be negligible, and thus, significantly below the annual threshold for private-sector mandates ($100 million in 1996, adjusted for inflation).

Previous CBO estimates: On March 8, 1999, CBO transmitted a cost estimate for S. 247, the Satellite Home Viewers Improvements Act, as ordered reported by the Senate Committee on the Judiciary on February 25, 1999. That bill would reduce the royalty fee and extend the requirement that satellite carriers pay royalty fees until December 31, 2004. On April 7, 1999, CBO transmitted an estimate for H.R. 851, the Satellite Competition and Consumer Protection Act, as ordered reported by the House Committee on Commerce on March 24, 1999. That bill would reduce the royalty fee and permanently extend the requirement that satellite carriers pay royalty fees. Thus, CBO estimated that S. 247 and H.R. 851 would each have a significant impact on revenues and direct spending, in contrast to the much more limited effects estimated for S. 303.

Estimate prepared by: Federal costs—Mark Hadley; revenues—Hester Grippando; impact on the private sector—Jean Wooster.

Estimate approved by: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

The Committee believes that the bill will not subject any individuals or businesses affected by the bill to any additional regulation.

ECONOMIC IMPACT

After full implementation of the bill, individuals and businesses will benefit from increased opportunities for competition in the provision of multichannel video services. Consumers will benefit from new choices in the multichannel video marketplace, competitive pricing and product offerings from both cable and satellite carriers. Increased competition, and the resulting choices in the marketplace will provide consumers with better and more product for their dollar, as well as potentially freeing up their resources for other pursuits.

Local stations and businesses that advertise on them will find their market reach as wide as ever, if not increased due to increased numbers of consumers able to clearly watch their programming. For those viewers residing in the Grade B contour and denied access to distant network signals, S. 303's simpler and more predictable waiver process will ensure that those legitimately unserved viewers will finally have access to watchable network television. The networks will benefit, at no detriment to local stations not being watched due to poor signal reception, as network viewership increases, providing a larger audience to national advertisers.

Finally, CBO's analysis indicates increased payments to copyright holders as a result of increased access to copyrighted programs for multichannel video service providers. These benefits will be realized at a negligible cost to the federal government, with no cost to State, local, and tribal governments.

PRIVACY

There will be no impact on personal privacy as a result of this legislation.

PAPERWORK

The paperwork resulting from this legislation will be primarily due to the FCC proceedings to develop a consumer waiver process and to determine whether any distant signal carriage should be made permanent.

SECTION-BY-SECTION ANALYSIS

Section 1. Short Title

This section provides a short title of the reported bill, the "Satellite Television Act of 1999."

Section 2. Findings

This section provides Congressional findings. These findings recite that, notwithstanding the passage of the 1996 Telecommunications Act, cable rates have increased because cable television services still do not face adequate effective competition. The findings then cite the inability of direct-to-home satellite service providers to carry local television stations as a major impediment to their ability to compete with cable. However, the findings also recognize that maintaining free over-the-air-television is a preeminent public interest and that all multichannel video subscribers should be able to receive at least one affiliate of each of the major broadcast networks. The findings therefore conclude that it is in the public interest to allow direct-to-home satellite service providers to continue existing carriage of a distant network affiliate station's signal where: (1) there is no local network affiliate; (2) the local network affiliate cannot be adequately received off-air; or (3) continued carriage would not harm the local network station.

Section 3. Purpose

This section states the purpose of the reported bill, which is to promote competition in the provision of multichannel video services while protecting the viability of free, local, over-the-air television.

Section 4. Must-Carry for Satellite Carriers Retransmitting Television Broadcast Signals Carriage of Local Stations by Satellite Carriers

The bill requires that the mandatory carriage or "must carry" provisions of Sections 614 and 615 of the Act will apply for all local stations, both commercial and non-commercial, no later than January 1, 2002. Given the tremendous number of satellite transponders that would be required to enable direct-to-home satellite service providers to beam all local signals into the markets they serve today, requiring satellite television providers to comply with must-carry rules now would impose an impossible burden incompatible with their ability to continue to compete in the multichannel video marketplace.

The date January 1, 2002, was selected because it is the earliest date estimated by which Capitol Broadcasting, a company formed by broadcasters for the express purpose of making local broadcast signals available to direct-to-home satellite service providers for satellite carriage into local markets, will be able to offer its proposed service.

Until satellite television must-carry rules take effect, satellite television service providers may offer any package of local television signals they wish, or none at all.

The cost of providing a good quality signal to the satellite carrier's designated receive facility is to be borne by the television broadcast station. However, the satellite carrier is prohibited from selecting a receive facility that would effectively frustrate the must-carry provisions. The FCC is directed to adopt rules within 180 days that implement this section in a way that does not impose any undue economic burden on either broadcasters or direct-to-home satellite service providers.

The bill stipulates that the must carry provisions do not apply to the carriage of digital signals of television broadcast stations by cable television systems.

Provision of Distant Television Stations By Direct-to-Home Satellite Service Providers

Section 338 of the bill contains different provisions with regard to distant network signal carriage by direct-to-home satellite service providers, depending on whether the subscriber is a new or existing one, and, if an existing subscriber, on where in the local television market the subscriber resides.

For new subscribers, defined as those initially subscribing after July 10, 1998, the bill provides that satellite television operators are permitted to provide at least one affiliate of each television network. As explained more fully below, this minimum four-network affiliate provision will apply to consumers who became DBS subscribers after July 10, 1998, and who receive Grade B or better signal strength from each local affiliate of the ABC, CBS, FOX, and NBC television networks. Allowing DBS providers to offer at least one affiliate of each of the major national networks will enable DBS to compete more effectively with cable television.

The cut-off date of July 10, 1998, was selected because it is the date of the preliminary injunction issued by the U.S. District Court in Miami in the CBS et al. v. PrimeTime 24 Partners case. The Committee finds that, in light of the widespread attention given to this development, after July 10, 1998, all DBS providers should have known that they needed to take more care in determining prospective subscribers' eligibility for distant network signal packages before signing them up for service. This cut-off date avoids rewarding companies for what can be considered to be reckless violation of the law.

In order to determine the eligibility of new satellite subscribers to receive distant network signal service, the provision creates a new eligibility regime. Under the bill a new subscriber can receive one or more distant signals from stations affiliated with ABC, CBS, FOX or NBC, if the subscriber cannot receive an off-air signal of Grade B intensity from the corresponding local network station by using a conventional rooftop antenna. The methodology to be used is the Individual Location Longley-Rice (ILLR) predictive methodology recommended by the Commission in Docket 98-201.

A post-July 10, 1998, DBS subscriber who cannot receive a signal of Grade B intensity from a local network station is not limited to receiving only one distant station affiliated with the same network. As noted previously, this subscriber, by definition, is not "served" by the local affiliate. The local affiliate therefore cannot, as a practical matter, count that subscriber as a part of its audience and revenue base. Thus, it is immaterial how many duplicating distant network affiliates an unserved DBS subscriber receives. The local affiliate need not incur programming expenses on behalf of that subscriber, nor should it include that subscriber in its revenue base.

As stated previously, the Grade B standard was originally developed decades ago by the FCC to measure interference levels, not the quality of the signal the viewer actually receives. Thus, for purposes of SHVA, the Grade B standard is being used to define something that it was not originally intended to define: the quality of over-the-air reception from the consumer's perspective. As a result, many consumers, particularly those at the outer edge of a television station's service area, are not satisfied with their local off-air reception, and even less satisfied with being advised that it is considered acceptable enough under the law to bar them from getting superior service from a distant network station offered as part of a DBS package.

Despite its unsuitability for the purposes for which it is being used in SHVA, the fact remains that the Grade B standard has been used by broadcasters for many years to define the practical limits of their local markets. To change that standard now, even where the case is as strong as it is here, would be to introduce an uncertainty into local broadcast operations that would have unpredictable ramifications beyond the issue of DBS distant signal carriage.

Because of this, the bill does not redefine what constitutes adequate off-air service, but instead provides a process through which consumers can seek a waiver and receive a distant network signal if they do not feel that they are truly "served," or if they have other special needs or circumstances, or even if they just want the added program diversity.

The FCC is directed to develop and adopt such a consumer waiver process within 90 days of the bill's enactment. To guarantee that the rules primarily reflect the interests of the consumers affected by this problem, the bill specifies that this process shall not impose any unnecessary burdens on a subscriber seeking a waiver. To balance the competing interests of direct-to-home satellite service providers and broadcasters, the bill also requires that the FCC fairly allocate responsibilities between these two industries. To make sure that consumers' waiver requests do not languish without action by the responsible parties, the bill mandates time limits. To encourage the DBS and broadcast industries to work as cooperatively as possible with consumers and not "game" the process by encouraging potential subscribers to pursue waiver requests they know to be without merit, the bill provides that the costs of testing to determine whether a subscriber meets the waiver standard will be paid by the local television station if the consumer's signal does not meet the minimum standard, and by the DBS provider if it does.

To deter DBS providers from deliberately ignoring the law and to underscore the importance of preserving local broadcasting, the bill also provides that any satellite television provider that knowingly and willfully provides one or more distant network signals to ineligible subscribers shall be liable for forfeiture in the amount of $50,000 per day, per violation.

The most difficult issue to resolve in the course of considering the bill was the issue of what should be done about distant network signal carriage that predated July 10, 1998.

There is no question that DBS companies violated the law by providing distant network signals to consumers who reside within a local television station's Grade B contour. However, DBS subscribers purchased their satellite service in good faith. For many of these subscribers, distant signals provide the only source of adequate network television reception. This is particularly true in rural areas. Yet, despite the fact that DBS subscribers are customers, not accomplices, of the companies that actually broke the law, and despite the fact that local broadcasters have not been able to show that they are suffering any substantial harm as a result, the court orders requiring DBS providers to delete their distant network signals effectively requires these consumers to pay the consequences of the DBS operators' actions.

An amendment to the bill protects consumers who received distant network signals before January 1, 1999, from disruptive summary signal termination. Under the bill, all consumers who reside in the local affiliate's Grade A or Grade B contour and received distant network signals before January 1, 1999, may continue receiving these signals until December 31, 1999. This will allow time for DBS providers to apply the Longley-Rice method and authoritatively determine which of its existing subscribers are actually outside the Grade B contour and thus eligible to continue receiving distant signals. The moratorium on distant signal termination will also enable DBS subscribers who reside within the Grade B contour, but are not satisfied with the quality of their over-the-air reception, to apply for a waiver under the new consumer waiver process.

After December 31, 1999, a satellite television subscriber in the Grade A contour will no longer be grandfathered unless a Longley-Rice analysis determines that the subscriber is "unserved." Because it considers factors such as terrain, the Longley-Rice analysis may determine that the local topography prevents a subscriber located in a Grade A contour from receiving the local over-the-air signal. In such a case, the subscriber will be allowed to continue receiving the satellite's distant network signal. Because that subscriber is not within the local affiliate's audience, any program exclusivity rules adopted by the FCC would not apply, and the DBS provider may offer that subscriber other distant stations affiliated with the same network. A subscriber in the Grade A contour may also continue to receive the distant network signal if the subscriber applies for and receives a waiver from the local broadcast station under the new subscriber waiver process.

The bill would, therefore, terminate distant signal carriage after December 31, 1999, for those satellite television subscribers in the Grade A contour who fail to qualify for distant signal coverage under a Longley-Rice analysis, or who cannot obtain a waiver from the local affiliate of the distant stations at issue. As explained previously, the Grade A contour defines the area closest to the local television station; it is typically the core of the local station's market for audience support and advertiser revenue and the area the local station is presumed to cover with a strong, clear off-air signal. For these reasons it is also the area in which satellite television companies' carriage of distant network signals is most likely to have been a deliberate flouting of the law, the area where the distant signals' continued carriage would have a particularly adverse effect on the local broadcaster, and the area satellite television subscribers would likely find local stations to be acceptable substitutes for the distant ones given their proximity to the local stations' community of license.

In contrast, the area outside of the Grade A contour, but within the Grade B contour, is the area in which subscribers most often find their local signal's off-air reception subjectively unsatisfactory. Thus, summary deletion of the distant signals is likely to be much more objectionable to these subscribers.

For these reasons, the bill does not require the termination of distant signals for DBS subscribers who reside between the margins of the local station's predicted Grade A and Grade B contours. It instead directs the FCC to complete a rulemaking within 180 days that would determine whether, and to what extent, this distant signal carriage should be subject to any of the FCC's current program exclusivity rules. These rules variously require cable television system operators to delete the network, syndicated, and sports programming broadcast on distant stations that duplicates programming that a local station is licensed to carry.

Although the cable television industry is currently subject to the program exclusivity rules, the Committee recognizes that there are fundamental differences between program distribution by cable and program distribution by a satellite service. Programming delivered to all subscribers within a cable operator's local franchise area is controlled at the cable operator's head-end and can be easily blacked out throughout the franchised area. However, satellite television providers would face a much more complex problem. Satellite television providers could be overwhelmed by the complexity involved in providing alternative programming to blacked-out areas while still providing the original programming to areas not subject to the blackout. In addition, the sheer volume of potentially thousands of requests for blackouts from across the nation on a daily basis could prove impossible to manage. Thus, there may be unreasonable technical, economic, and administrative burdens imposed on DBS providers if they were required to comply with program exclusivity rules on the same individual-household basis as cable television system operators, and the Committee requires that they should be taken into account when the Commission conducts its proceeding. Thus, the Committee has prohibited the Commission from imposing program exclusivity rules on DBS providers unless the Commission finds that it would be technically and economically feasible to do so, and otherwise in the public interest.

Technical feasibility is required because of the extent of the burden that DBS providers would have to incur to comply with these rules. Economic feasibility is required to avoid imposing regulatory burdens that would stifle the very competitiveness of the DBS industry that this legislation seeks to enhance.

Finally, in the context of this section, the term “public interest” has a very specific meaning. It means that, even if the FCC were to ultimately find that imposing program black-out rules were technically and economically feasible, it must still make a further finding, based on substantial evidence in the record, that imposing any such rules would be necessary to assure the continued vitality of local over-the-air television service. The “public interest” standard as used in this Section confers no authority on the Commission to impose any conditions or adopt any other requirements whatsoever with regard to DBS providers’ carriage of distant network signals.

Finally, the bill specifies that any no provision of this bill prohibits a local broadcast station from authorizing the provision of distant network signals. And the bill clarifies that DBS providers may continue to provide distant network signals to a subscriber who is outside the Grade B contour, and is thus “unserved,” or if the signal carriage is consistent with rules adopted by the FCC.

Section 5. Retransmission Consent

This section generally restates the existing law governing retransmission consent, but makes several changes. Section 5 modifies the retransmission consent provision of the Communications Act. Section 325(b) modifies an existing exemption from the retransmission consent provision of the Communications Act. Currently, section 325(b) exempts from the retransmission consent requirement the so-called “superstations” that have been distributed nationally by satellite carriers for cable, DBS and home use. But this exemption precludes exempt “superstations” from being owned, operated, or affiliated with a network. Some superstations have become affiliates of newly-emerging networks like WB and UPN. This threatens to nullify the exemption and defeat Congressional intent that popular superstation signals remain available to consumers. The amendment to section 325(b)(2) allows viewers continued access to current superstations that have become network stations since 1991. At the same time, the amendment limits the exemption to those stations that still are distributed nationally by satellite carriers pursuant to section 119 of title 17, United States Code.

Additionally, under current law local non-commercial stations cannot opt to negotiate for retransmission consent. This section amends the current retransmission consent statute to extend the retransmission consent option to noncommercial stations. This change will allow public television stations to negotiate carriage arrangements with satellite television service carriers.

Section 6. Designated Market Areas

This section allows the FCC to revise the designated market areas or to reassign those areas if the revision or reassignment is done in the same manner and to the same extent as applies in the context of the Commission's cable television mandatory carriage rules.

Section 7. Severability

This section constitutes a standard severability clause, providing that if any provision of the legislation or any provision of an amendment made by the legislation, or the application thereof to particular persons or circumstances, is held to be unconstitutional, any remaining provisions or the application thereof to other persons or circumstances shall remain unaffected.

Section 8. Secondary Transmissions

This section amends section 119 of Title 17 to permit continued secondary transmissions of the remaining superstation signals pursuant to the statutory license in that section even if the superstation has affiliated with a network.

Section 9. Definitions

This section conforms definitions preexisting in the Communications Act to those provided in the Satellite Television Act.

ROLLCALL VOTES IN COMMITTEE

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following description of the record votes during its consideration of S. 303:

Senator Hollings offered an amendment in the nature of a substitute. By a rollcall vote of 8 yeas and 12 nays, the amendment was defeated:

YEAS—8—	NAYS—12
Mr. Stevens [1]	Mr. McCain
Mr. Ashcroft [1]–	Mr. Burns [1]
Mr. Hollings–	Mr. Gorton
Mr. Inouye [1] –	Mr. Lott [1]
Mr. Kerry [1]–	Mrs. Hutchison
Mr. Dorgan—	Ms. Snowe
Mr. Wyden—	Mr. Frist [1]
Mr. Cleland—	Mr. Abraham [1]——
	Mr. Brownback——
	Mr. Rockefeller——
	Mr. Breaux [1] ——
	Mr. Bryan

[1] By proxy.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

Communications Act of 1934

Title III—Provisions Relating to Radio

PART I. GENERAL PROVISIONS

SEC. 325. FALSE DISTRESS SIGNALS; REBROADCASTING; STUDIOS OF FOREIGN STATIONS.

(a) No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signals of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.

⟦(b)(1) Following the date that is one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except—

⟦(A) with the express authority of the originating station; or

⟦(B) pursuant to section 614, in the case of a station electing, in accordance with this subsection, to assert the right to carriage under such section.

⟦(2) The provisions of this subsection shall not apply to—

⟦(A) retransmission of the signal of a noncommercial broadcasting station;

⟦(B) retransmission directly to a home satellite antenna of the signal of a broadcasting station that is not owned or operated by, or affiliated with, a broadcasting network, if such signal was retransmitted by a satellite carrier on May 1, 1991;

⟦(C) retransmission of the signal of a broadcasting station that is owned or operated by, or affiliated with, a broadcasting network directly to a home satellite antenna, if the household receiving the signal is an unserved household; or

⟦(D) retransmission by a cable operator or other multichannel video programming distributor of the signal of a superstation if such signal was obtained from a satellite carrier and the originating station was a superstation on May 1, 1991.

⟦For purposes of this paragraph, the terms "satellite carrier", "superstation", and "unserved household" have the meanings given those terms, respectively, in section 119(d) of title 17, United States Code, as in effect on the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992.

⟦(3)(A) Within 45 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, the Commission shall commence a rulemaking proceeding to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection and of the right to signal carriage under section 614, and such other regulations as are necessary to administer the limitations contained in paragraph (2). The Commission shall consider in such proceeding the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligation under section 623(b)(1) to ensure that the rates for the basic service tier are reasonable. Such rulemaking proceeding shall be completed within 180 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992.

⟦(B) The regulations required by subparagraph (A) shall require that television stations, within one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992 and every three years thereafter, make an election between the right to grant retransmission consent under this subsection and the right to signal carriage under section 614. If there is more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems.

⟦(4) If an originating television station elects under paragraph (3)(B) to exercise its right to grant retransmission consent under this subsection with respect to a cable system, the provisions of section 614 shall not apply to the carriage of the signal of such station by such cable system.

⟦(5) The exercise by a television broadcast station of the right to grant retransmission consent under this subsection shall not interfere with or supersede the rights under section 614 or 615 of any station electing to assert the right to signal carriage under that section.

⟦(6) Nothing in this section shall be construed as modifying the compulsory copyright license established in section 111 of title 17, United States Code, or as affecting existing or future video programming licensing agreements between broadcasting stations and video programmers.⟧

(b)(1) No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except—

(A) with the express authority of the station; or

(B) pursuant to section 614 or section 615, in the case of a station electing, in accordance with this subsection, to assert the right to carriage under that section.

(2) The provisions of this subsection shall not apply to—

(A) retransmission of the signal of a television broadcast station outside the station's local market by a satellite carrier directly to subscribers if—

(i) that station was a superstation on May 1, 1991;

(ii) as of July 1, 1998, such station's signal was transmitted under the compulsory license of section 119 of title 17, United States Code, by satellite carriers directly to at least 250,000 subscribers; and

(iii) the satellite carrier complies with any program exclusivity rules that may be adopted by the Federal Communications Commission pursuant to section 338.

(B) retransmission of the distant signal of a broadcasting station that is owned or operated by, or affiliated with, a broadcasting network directly to a home satellite antenna, if the subscriber resides in an unserved household; or

(C) retransmission by a cable operator or other multichannel video programming distributor (other than by a satellite carrier direct to its subscribers) of the signal of a television broadcast station outside the station's local market, if that signal was obtained from a satellite carrier and—

(i) the originating station was a superstation on May 1, 1991; and

(ii) the originating station was a network station on December 31, 1997, and its signal was retransmitted by a satellite carrier directly to subscribers.

(3) Any term used in this subsection that is defined in section 337(d) of this Act has the meaning given to it by that section.

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SEC. 338. CARRIAGE OF LOCAL TELEVISION STATIONS BY SATELLITE CARRIERS.

(a) APPLICATION OF MANDATORY CARRIAGE TO SATELLITE CARRIERS.—The mandatory carriage provisions of sections 614 and 615 of this Act will apply in a local market no later than January 1, 2002, to satellite carriers retransmitting any television broadcast station in that local market pursuant to the compulsory license provided by section 122 of title 17, United States Code.

(b) GOOD SIGNAL REQUIRED.—

(1) COSTS.—A television broadcast station eligible for carriage under subsection (a) may be required to bear the costs associated with delivering a good quality signal to the designated local receive facility of the satellite carrier. The selection of a local receive facility by a satellite carrier shall not be made in a manner that frustrates the purposes of this Act. The Commission shall implement the requirements of this section without imposing any undue economic burden on any party.

(2) RULEMAKING REQUIRED.—The Commission shall adopt rules implementing paragraph (1) within 180 days after the date of enactment of the Satellite Television Act of 1999.

(c) CABLE TELEVISION SYSTEM DIGITAL SIGNAL CARRIAGE NOT COVERED.—Nothing in this section applies to the carriage of the digital signals of television broadcast stations by cable television systems.

(d) DEFINITIONS.—In this section:

(1) TELEVISION BROADCAST STATION.—The term "television broadcast station" means a full power local television broadcast station, but does not include a low-power or translator television broadcast station.

(2) NETWORK STATION.—The term "network station" means a television broadcast station that is owned or operated by, or affiliated with, a broadcasting network.

(3) BROADCASTING NETWORK.—The term "broadcasting network" means a television network in the United States which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated broadcast stations in 10 or more States.

(4) DISTANT TELEVISION STATION.—The term "distant television station" means any television broadcast station that is not licensed and operating on a channel regularly assigned to

the local television market in which a subscriber to a direct-to-home satellite service is located.

(5) LOCAL MARKET.—The term "local market" means the designated market area in which a station is located. For a noncommercial educational television broadcast station, the local market includes any station that is licensed to a community within the same designated market area as the noncommercial educational television broadcast station.

(6) SATELLITE CARRIER.—The term "satellite carrier" has the meaning given it by section 119(d) of title 17, United States Code.

SEC. 339. CARRIAGE OF DISTANT TELEVISION STATIONS BY SATELLITE CARRIERS.

(a) PROVISIONS RELATING TO NEW SUBSCRIBERS.—

(1) IN GENERAL.—Except as provided in subsection (d), direct-to-home satellite service providers shall be permitted to provide the signals of 1 affiliate of each television network to any household that initially subscribed to direct-to-home satellite service on or after July 10, 1998.

(2) ELIGIBILITY DETERMINATION.—The determination of a new subscriber's eligibility to receive the signals of one or more distant network stations as a component of the service provided pursuant to paragraph (a) shall be made by ascertaining whether the subscriber resides within the predicted Grade B service area of a local network station. The Individual Location Longley-Rice methodology described by the Commission in Docket 98–201 shall be used to make this determination. A direct-to-home satellite service provider may provide the signal of a distant network station to any subscriber determined by this method to be unserved by a local station affiliated with that network.

(3) RULEMAKING REQUIRED.—

(A) Within 90 days after the date of enactment of the Satellite Television Act of 1999, the Commission shall adopt procedures that shall be used by any direct-to-home satellite service subscriber requesting a waiver to receive one or more distant network signals. The waiver procedures adopted by the Commission shall—

(i) impose no unnecessary burden on the subscriber seeking the waiver;

(ii) allocate responsibilities fairly between direct-to-home satellite service providers and local stations;

(iii) prescribe mandatory time limits within which direct-to-home satellite service providers and local stations shall carry out the obligations imposed upon them; and

(iv) prescribe that all costs of conducting any measurement or testing shall be borne by the direct-to-home satellite service provider, if the local station's signal meets the prescribed minimum standards, or by the local station, if its signal fails to meet the prescribed minimum standards.

(4) PENALTY FOR VIOLATION.—Any direct-to-home satellite service provider that knowingly and willfully provides the sig-

nals of 1 or more distant television stations to subscribers in violation of this section shall be liable for forfeiture in the amount of $50,000 per day per violation.

(b) PROVISIONS RELATING TO EXISTING SUBSCRIBERS.—

(1) MORATORIUM ON TERMINATION.—Until December 31, 1999, any direct-to-home satellite service may continue to provide the signals of distant television stations to any subscriber located within predicted Grade A and Grade B contours of a local network station who received those distant network signals before July 11, 1998.

(2) CONTINUED CARRIAGE.—Direct-to-home satellite service providers may continue to provide the signals of distant television stations to subscribers located between the outside limits of the predicted Grade A contour and the predicted Grade B contour of the corresponding local network stations after December 31, 1999, subject to any limitations adopted by the Commission under paragraph (3).

(3) RULEMAKING REQUIRED.—

(A) Within 180 days after the date of enactment of the Satellite Television Act of 1999, the Commission shall conclude a single rulemaking, compliant with subchapter II of chapter 5 of title 5, United States Code, to examine the extent to which any existing program exclusivity rules should be imposed on distant network stations provided to subscribers under paragraph (2).

(B) The Commission shall not impose any program exclusivity rules on direct-to-home satellite service providers pursuant to subparagraph (A) unless it finds that it would be both technically and economically feasible and otherwise in the public interest to do so.

(c) WAIVERS NOT PRECLUDED.—Notwithstanding any other provision in this section, nothing shall preclude any network station from authorizing the continued provision of distant network signals in unaltered form to any direct-to-home satellite service subscriber currently receiving them.

(d) CERTAIN SIGNALS.—Providers of direct-to-home satellite service may continue to carry the signals of distant network stations without regard to subsections (a) and (b) in any situation in which—

(1) a subscriber is unserved by the local station affiliated with that network;

(2) a waiver is otherwise granted by the local station under subsection (c); or

(3) if the carriage would otherwise be consistent with rules adopted by the Commission in CS Docket 98–201.

(e) REPORT REQUIRED.—Within 180 days after the date of enactment of the Satellite Television Act of 1999, the Commission shall report to Congress on methods of facilitating the delivery of local signals in local markets, especially smaller markets.

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Title 17, United States Code

Chapter 1. Subject Matter and Scope of Copyright

§ 119. Limitations on exclusive rights: Secondary transmissions of superstations and network stations for private home viewing

(a) SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS.—

(1) SUPERSTATIONS.—Subject to the provisions of paragraphs (3), (4), and (6) of this subsection and section 114(d), secondary transmissions of a primary transmission made by a superstation and embodying a performance or display of a work shall be subject to statutory licensing under this section if the secondary transmission is made by a satellite carrier to the public for private home viewing, and the carrier makes a direct or indirect charge for each retransmission service to each household receiving the secondary transmission or to a distributor that has contracted with the carrier for direct or indirect delivery of the secondary transmission to the public for private home viewing.

(2) NETWORK STATIONS.—

(A) IN GENERAL.—Subject to the provisions of subparagraphs (B) and (C) of this paragraph and paragraphs (3), (4), (5), and (6) of this subsection and section 114(d), secondary transmissions of programming contained in a primary transmission made by a network station and embodying a performance or display of a work shall be subject to statutory licensing under this section if the secondary transmission is made by a satellite carrier to the public for private home viewing, and the carrier makes a direct or indirect charge for such retransmission service to each subscriber receiving the secondary transmission.

[(B) SECONDARY TRANSMISSIONS TO UNSERVED HOUSEHOLDS.—The statutory license provided for in subparagraph (A) shall be limited to secondary transmissions to persons who reside in unserved households.]

(B) SECONDARY TRANSMISSIONS TO UNSERVED HOUSEHOLDS.—Except as provided in paragraph (5)(E) of this subsection, the license provided for in subparagraph (A) shall be limited to secondary transmissions to persons who reside in unserved households.

(C) SUBMISSION OF SUBSCRIBER LISTS TO NETWORKS.—A satellite carrier that makes secondary transmissions of a primary transmission made by a network station pursuant to subparagraph (A) shall, 90 days after commencing such secondary transmissions, submit to the network that owns or is affiliated with the network station a list identifying (by name and street address, including county and zip code) all subscribers to which the satellite carrier currently makes secondary transmissions of that primary transmission. Thereafter, on the 15th of each month, the satellite carrier shall submit to the network a list identifying (by name and street address, including county and zip code) any persons who have been added or dropped as such subscribers since the last submission under this subparagraph. Such subscriber information submitted by a satellite carrier may be used only for purposes of monitoring compliance by the satellite carrier with this subsection. The submission requirements of this subparagraph shall apply to a satellite carrier only if the network to whom the submissions are to be made places on file with the Register of Copyrights a document identifying the name and address of the person to whom such submissions are to be made. The Register shall maintain for public inspection a file of all such documents.

(3) NONCOMPLIANCE WITH REPORTING AND PAYMENT REQUIREMENTS.—Notwithstanding the provisions of paragraphs (1) and (2), the willful or repeated secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation or a network station and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, where the satellite carrier has not deposited the statement of account and royalty fee required by subsection (b), or has failed to make the submissions to networks required by paragraph (2)(C).

(4) WILLFUL ALTERATIONS.—Notwithstanding the provisions of paragraphs (1) and (2), the secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation or a network station and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcement transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the satellite carrier through changes, deletions, or additions, or is combined with programming from any other broadcast signal.

(5) VIOLATION OF TERRITORIAL RESTRICTIONS ON STATUTORY LICENSE FOR NETWORK STATIONS.—

(A) INDIVIDUAL VIOLATIONS.—The willful or repeated secondary transmission by a satellite carrier of a primary transmission made by a network station and embodying a performance or display of a work to a subscriber who does not reside in an unserved household is actionable as an act of infringement under section 501 and is fully subject to the remedies provided by sections 502 through 506 and 509, except that—

(i) no damages shall be awarded for such act of infringement if the satellite carrier took corrective action by promptly withdrawing service from the ineligible subscriber, and

(ii) any statutory damages shall not exceed $5 for such subscriber for each month during which the violation occurred.

(B) PATTERN OF VIOLATIONS.—If a satellite carrier engages in a willful or repeated pattern or practice of delivering a primary transmission made by a network station and embodying a performance or display of a work to subscribers who do not reside in unserved households, then in addition to the remedies set forth in subparagraph (A)—

(i) if the pattern or practice has been carried out on a substantially nationwide basis, the court shall order a permanent injunction barring the secondary transmission by the satellite carrier, for private home viewing, of the primary transmissions of any primary network station affiliated with the same network, and the court may order statutory damages of not to exceed $250,000 for each 6-month period during which the pattern or practice was carried out; and

(ii) if the pattern or practice has been carried out on a local or regional basis, the court shall order a permanent injunction barring the secondary transmission, for private home viewing in that locality or region, by the satellite carrier of the primary transmissions of any primary network station affiliated with the same network, and the court may order statutory damages of not to exceed $250,000 for each 6-month period during which the pattern or practice was carried out.

(C) PREVIOUS SUBSCRIBERS EXCLUDED.—Subparagraphs (A) and (B) do not apply to secondary transmissions by a satellite carrier to persons who subscribed to receive such secondary transmissions from the satellite carrier or a distributor before November 16, 1988.

(D) BURDEN OF PROOF.—In any action brought under this paragraph, the satellite carrier shall have the burden of proving that its secondary transmission of a primary transmission by a network station is for private home viewing to an unserved household.

(E) EXCEPTION.—The secondary transmission by a satellite carrier of a primary transmission made by a network station to subscribers who do not reside in unserved households shall not be an act of infringement if—

(i) that station was a superstation on May 1, 1991; and

(ii) that station was lawfully retransmitted by satellite carriers directly to at least 250,000 subscribers as of July 1, 1998.

(6) DISCRIMINATION BY A SATELLITE CARRIER.—Notwithstanding the provisions of paragraph (1), the willful or repeated secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation or a network station and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if the satellite carrier unlawfully discriminates against a distributor.

(7) GEOGRAPHIC LIMITATION ON SECONDARY TRANSMISSIONS.—The statutory license created by this section shall apply only

to secondary transmissions to households located in the United States.

(8) TRANSITIONAL SIGNAL INTENSITY MEASUREMENT PROCEDURES.—

(A) IN GENERAL.—Subject to subparagraph (C), upon a challenge by a network station regarding whether a subscriber is an unserved household within the predicted Grade B Contour of the station, the satellite carrier shall, within 60 days after the receipt of the challenge—

(i) terminate service to that household of the signal that is the subject of the challenge, and within 30 days thereafter notify the network station that made the challenge that service to that household has been terminated; or

(ii) conduct a measurement of the signal intensity of the subscriber's household to determine whether the household is an unserved household after giving reasonable notice to the network station of the satellite carrier's intent to conduct the measurement.

(B) EFFECT OF MEASUREMENT.—If the satellite carrier conducts a signal intensity measurement under subparagraph (A) and the measurement indicates that—

(i) the household is not an unserved household, the satellite carrier shall, within 60 days after the measurement is conducted, terminate the service to that household of the signal that is the subject of the challenge, and within 30 days thereafter notify the network station that made the challenge that service to that household has been terminated; or

(ii) the household is an unserved household, the station challenging the service shall reimburse the satellite carrier for the costs of the signal measurement within 60 days after receipt of the measurement results and a statement of the costs of the measurement.

(C) LIMITATION ON MEASUREMENTS.—

(i) Notwithstanding subparagraph (A), a satellite carrier may not be required to conduct signal intensity measurements during any calendar year in excess of 5 percent of the number of subscribers within the network station's local market that have subscribed to the service as of the effective date of the Satellite Home Viewer Act of 1994.

(ii) If a network station challenges whether a subscriber is an unserved household in excess of 5 percent of the subscribers within the network's station local market within a calendar year, subparagraph (A) shall not apply to challenges in excess of such 5 percent, but the station may conduct its own signal intensity measurement of the subscriber's household after giving reasonable notice to the satellite carrier of the network station's intent to conduct the measurement. If such measurement indicates that the household is not an unserved household, the carrier shall, within 60 days after receipt of the measurement, terminate service to the household of the signal that is the subject of the challenge and within 30 days thereafter notify the network station that made the challenge that service has been terminated. The carrier shall also, within 60 days after receipt of the measurement and a statement of the costs of the measurement, reimburse the network station for the cost it incurred in conducting the measurement.

(D) OUTSIDE THE PREDICTED GRADE B CONTOUR.—

(i) If a network station challenges whether a subscriber is an unserved household outside the predicted Grade B Contour of the station, the station may conduct a measurement of the signal intensity of the subscriber's household to determine whether the household is an unserved household after giving reasonable notice to the satellite carrier of the network station's intent to conduct the measurement.

(ii) If the network station conducts a signal intensity measurement under clause (i) and the measurement indicates that—

(I) the household is not an unserved household, the station shall forward the results to the satellite carrier who shall, within 60 days after receipt of the measurement, terminate the service to the household of the signal that is the subject of the challenge, and shall reimburse the station for the costs of the measurement within 60 days after receipt of the measurement results and a statement of such costs; or

(II) the household is an unserved household, the station shall pay the costs of the measurement.

(9) LOSER PAYS FOR SIGNAL INTENSITY MEASUREMENT; RECOVERY OF MEASUREMENT COSTS IN A CIVIL ACTION.—In any civil action filed relating to the eligibility of subscribing households as unserved households—

(A) a network station challenging such eligibility shall, within 60 days after receipt of the measurement results and a statement of such costs, reimburse the satellite carrier for any signal intensity measurement that is conducted by that carrier in response to a challenge by the network station and that establishes the household is an unserved household; and

(B) a satellite carrier shall, within 60 days after receipt of the measurement results and a statement of such costs, reimburse the network station challenging such eligibility for any signal intensity measurement that is conducted by that station and that establishes the household is not an unserved household.

(10) INABILITY TO CONDUCT MEASUREMENT.—If a network station makes a reasonable attempt to conduct a site measurement of its signal at a subscriber's household and is denied access for the purpose of conducting the measurement, and is otherwise unable to conduct a measurement, the satellite car-

rier shall within 60 days notice thereof, terminate service of the station's network to that household.

(b) STATUTORY LICENSE FOR SECONDARY TRANSMISSIONS FOR PRIVATE HOME VIEWING.—

(1) DEPOSITS WITH THE REGISTER OF COPYRIGHTS.—A satellite carrier whose secondary transmissions are subject to statutory licensing under subsection (a) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation—

(A) a statement of account, covering the preceding 6-month period, specifying the names and locations of all superstations and network stations whose signals were transmitted, at any time during that period, to subscribers for private home viewing as described in subsections (a)(1) and (a)(2), the total number of subscribers that received such transmissions, and such other data as the Register of Copyrights may from time to time prescribe by regulation; and

(B) a royalty fee for that 6-month period, computed by—

(i) multiplying the total number of subscribers receiving each secondary transmission of a superstation during each calendar month by 17.5 cents per subscriber in the case of superstations that as retransmitted by the satellite carrier include any program which, if delivered by any cable system in the United States, would be subject to the syndicated exclusivity rules of the Federal Communications Commission, and 14 cents per subscriber in the case of superstations that are syndex-proof as defined in section 258.2 of title 37, Code of Federal Regulations;

(ii) multiplying the number of subscribers receiving each secondary transmission of a network station during each calendar month by 6 cents; and

(iii) adding together the totals computed under clauses (i) and (ii).

(2) INVESTMENT OF FEES.—The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section (other than the costs deducted under paragraph (4)), shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing securities of the United States for later distribution with interest by the Librarian of Congress as provided by this title.

(3) PERSONS TO WHOM FEES ARE DISTRIBUTED.—The royalty fees deposited under paragraph (2) shall, in accordance with the procedures provided by paragraph (4), be distributed to those copyright owners whose works were included in a secondary transmission for private home viewing made by a satellite carrier during the applicable 6-month accounting period and who file a claim with the Librarian of Congress under paragraph (4).

(4) PROCEDURES FOR DISTRIBUTION.—The royalty fees deposited under paragraph (2) shall be distributed in accordance with the following procedures:

(A) FILING OF CLAIMS FOR FEES.—During the month of July in each year, each person claiming to be entitled to statutory license fees for secondary transmissions for private home viewing shall file a claim with the Librarian of Congress, in accordance with requirements that the Librarian of Congress shall prescribe by regulation. For purposes of this paragraph, any claimants may agree among themselves as to the proportionate division of statutory license fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) DETERMINATION OF CONTROVERSY; DISTRIBUTIONS.—After the first day of August of each year, the Librarian of Congress shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Librarian of Congress determines that no such controversy exists, the Librarian of Congress shall, after deducting reasonable administrative costs under this paragraph, distribute such fees to the copyright owners entitled to receive them, or to their designated agents. If the Librarian of Congress finds the existence of a controversy, the Librarian of Congress shall, pursuant to chapter 8 of this title, convene a copyright arbitration royalty panel to determine the distribution of royalty fees.

(C) WITHHOLDING OF FEES DURING CONTROVERSY.—During the pendency of any proceeding under this subsection, the Librarian of Congress shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(c) ADJUSTMENT OF ROYALTY FEES.—

(1) APPLICABILITY AND DETERMINATION OF ROYALTY FEES.—The rate of the royalty fee payable under subsection (b)(1)(B) shall be effective unless a royalty fee is established under paragraph (2) or (3) of this subsection.

(2) FEE SET BY VOLUNTARY NEGOTIATION.—

(A) NOTICE OF INITIATION OF PROCEEDINGS.—On or before July 1, 1996, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining the royalty fee to be paid by satellite carriers under subsection (b)(1)(B).

(B) NEGOTIATIONS.—Satellite carriers, distributors, and copyright owners entitled to royalty fees under this section shall negotiate in good faith in an effort to reach a voluntary agreement or voluntary agreements for the payment of royalty fees. Any such satellite carriers, distributors, and copyright owners may at any time negotiate and agree to the royalty fee, and may designate common agents to negotiate, agree to, or pay such fees. If the parties fail to identify common agents, the Librarian of Congress shall do so, after requesting recommendations from the parties to the negotiation proceeding. The parties to each negotiation proceeding shall bear the entire cost thereof.

(C) AGREEMENTS BINDING ON PARTIES; FILING OF AGREEMENTS.—Voluntary agreements negotiated at any time in accordance with this paragraph shall be binding upon all satellite carriers, distributors, and copyright owners that are parties thereto. Copies of such agreements shall be filed with the Copyright Office within 30 days after execution in accordance with regulations that the Register of Copyrights shall prescribe.

(D) PERIOD AGREEMENT IS IN EFFECT. The obligation to pay the royalty fees established under a voluntary agreement which has been filed with the Copyright Office in accordance with this paragraph shall become effective on the date specified in the agreement, and shall remain in effect until December 31, 1999, or in accordance with the terms of the agreement, whichever is later.

(3) FEE SET BY COMPULSORY ARBITRATION.—

(A) NOTICE OF INITIATION OF PROCEEDINGS.—On or before January 1, 1997, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of arbitration proceedings for the purpose of determining a reasonable royalty fee to be paid under subsection (b)(1)(B) by satellite carriers who are not parties to a voluntary agreement filed with the Copyright Office in accordance with paragraph (2). Such arbitration proceeding shall be conducted under chapter 8.

(B) ESTABLISHMENT OF ROYALTY FEES.—In determining royalty fees under this paragraph, the copyright arbitration royalty panel appointed under chapter 8 shall establish fees for the retransmission of network stations and superstations that most clearly represent the fair market value of secondary transmissions. In determining the fair market value, the panel shall base its decision on economic, competitive, and programming information presented by the parties, including—

(i) the competitive environment in which such programming is distributed, the cost of similar signals in similar private and compulsory license marketplaces, and any special features and conditions of the retransmission marketplace;

(ii) the economic impact of such fees on copyright owners and satellite carriers; and

(iii) the impact on the continued availability of secondary transmissions to the public.

(C) PERIOD DURING WHICH DECISION OF ARBITRATION PANEL OR ORDER OF LIBRARIAN EFFECTIVE.—The obligation to pay the royalty fee established under a determination which—

(i) is made by a copyright arbitration royalty panel in an arbitration proceeding under this paragraph and is adopted by the Librarian of Congress under section 802(f), or

(ii) is established by the Librarian of Congress under section 802(f), shall become effective as provided in section 802(g) or July 1, 1997, whichever is later.

(D) PERSONS SUBJECT TO ROYALTY FEE.—The royalty fee referred to in subparagraph (C) shall be binding on all satellite carriers, distributors, and copyright owners, who are not party to a voluntary agreement filed with the Copyright Office under paragraph (2).

(d) DEFINITIONS.—As used in this section—

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(2) NETWORK STATION.—The term "network station" means—

(A) a television broadcast station, including any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station, that is owned or operated by, or affiliated with, one or more of the television networks in the United States which offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States; or

(B) a noncommercial educational broadcast station (as defined in section 397 of the Communications Act of 1934.

(3) PRIMARY NETWORK STATION.—The term "primary network station" means a network station that broadcasts or rebroadcasts the basic programming service of a particular national network.

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(9) SUPERSTATION.—The term "superstation" means a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier.

(10) UNSERVED HOUSEHOLD.—The term "unserved household", with respect to a particular television network, means a household that—

(A) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of Grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network; and

(B) has not, within 90 days before the date on which that household subscribes, either initially or on renewal, to receive secondary transmissions by a satellite carrier of a network station affiliated with that network, subscribed to a cable system that provides the signal of a primary network station affiliated with that network.

(e) EXCLUSIVITY OF THIS SECTION WITH RESPECT TO SECONDARY TRANSMISSIONS OF BROADCAST STATIONS BY SATELLITE TO MEMBERS OF THE PUBLIC.—No provision of section 111 of this title or any other law (other than this section) shall be construed to contain any authorization, exemption, or license through which secondary transmissions by satellite carrier for private home viewing of programming contained in a primary transmission made by a superstation or a network station may be made without obtaining the consent of the copyright owner.

MINORITY VIEWS OF SENATOR HOLLINGS, SENATOR STEVENS, SENATOR KERRY, AND SENATOR CLELAND

We support a majority of the significant public policy objectives furthered by this bill as reported out of Committee. We object, however, to the legislation's treatment of one critically important issue, and therefore feel compelled to file minority views. In brief, we oppose provisions in the legislation that sanction the illegal behavior of direct broadcast satellite service providers. These provisions permanently grandfather the transmission of distant network signals to subscribers residing outside of the Grade A contour, but within the Grade B contour, regardless of whether those subscribers may actually be able to receive clear over-the-air broadcast signals from their local stations. These provisions put Congress squarely in the position of sanctioning illegal behavior. The role of Congress is to enact sound laws, not to condone the actions of those who break the laws we enact.

Competition has not developed in the cable television marketplace as rapidly as Congress had envisioned. Therefore, we support policies that promote viable competitors to cable in the multichannel video programming market. DBS's ability to become a viable competitor to cable is hampered by the current regulatory landscape which imposes outdated limits on the provision of DBS service. Therefore, legislation that ultimately passes the U.S. Senate should permit satellite providers to transmit local broadcast signals into local markets, and eliminate the 90 day waiting period for existing cable subscribers who wish to switch to satellite service. We also support the implementation of full must-carry by January 1, 2002, as required by the legislation reported by this Committee. Absent these pivotal changes in the law, DBS will continue to be hamstrung in its efforts to compete with cable.

In order to provide some protection to DBS subscribers, we support the compromise contained in the Committee reported bill that permits a temporary continuance of satellite transmission of distant network signals for existing subscribers within the Grade A contour. This compromise, which permits the transmission of those signals until December 31, 1999, would permit consumers to receive signals temporarily while the FCC develops an orderly and fair waiver process so that citizens who cannot in fact receive their local broadcast stations may legally receive distant network signals. This compromise also appropriately provides a date certain for termination of the transmission of distant network signals to served customers within the Grade A contour in recognition of the overwhelming likelihood that the transmission of such signals is in fact illegal.

While we favor these significant and constructive changes in the law, we opposed one significant aspect of the substitute amendment approved during the Committee's consideration of S. 303 for the simple reason that it ignores the legal framework that governs the relationship between local broadcasters, satellite providers, and customers. Under SHVA, satellite companies, through the use of a copyright compulsory license, can deliver distant network signals to unserved households. Satellite providers are not permitted under SHVA to provide distant network signals to served households. Under the approach adopted by the Commerce Committee, however, existing satellite subscribers who reside between the Grade A and Grade B contour lines, and who qualify as served customers, may continue to receive their distant network signals indefinitely. Such an approach cannot be justified simply by its proponents' unsupported contention that all DBS subscribers purchased their satellite service in good faith. Nor is the sanctioning of such illegality supported by the argument, voiced in the Majority views, that "local broadcasters have not been able to show that they are suffering any substantial harm as a result" of the illegal transmission of distant network signals within the Grade B contour. Laws are often broken "in good faith" without causing "substantial harm," but the U.S. Congress does not normally sanction such illegal activity. Moreover, when Congress has allowed conduct to be grandfathered in the past, our actions were premised on a change in the law that necessitated protecting prior legal behavior. The grandfather provision approved by this Committee, however, protects the prior illegal behavior of the satellite providers.

We also note with interest the fact that the permanent grandfather approach goes well beyond a settlement that was recently agreed to by representatives of the broadcast and satellite industries. The settlement terminates, for over 2 million consumers, the delivery of distant network signals into the Grade B contour at the end of this year. Finally, permitting the permanent transmission of distant network signals within the Grade B contour completely ignores the legal rules governing the satellite industry—as set forth in the Satellite Home Viewer Act and interpreted in recent federal district court opinions—that prohibit the sending of such signals to served households.

Perhaps in recognition of its significant departure from governing statutory and federal court authority, the legislation does attempt to address the adverse impact it could have on the many local broadcasters whose markets include thousands of customers within the Grade B contour. Specifically, the legislation requires the FCC to determine whether to apply program exclusivity rules to distant network stations' signals that are provided to existing subscribers residing between the Grade A and Grade B contours. The legislation directs the FCC, however, not to apply such program exclusivity rules unless it finds that it would "be both technically and economically feasible and otherwise in the public interest to do so."

The trouble with this approach is multifaceted. First, the FCC may determine that the application of exclusivity rules to distant network signals is in fact warranted. In that event, subscribers who would at first be grandfathered under the bill could subsequently have their distant network programming blacked out to a significant degree. Such a result would place Congress in a posture similar to that in which it finds itself today—inundated with thousands of consumer complaints that satellite network signals are being terminated. Although we recognize the importance of exclusivity rules in protecting local broadcasters from the transmission of distant network signals into their markets, we cannot agree with an approach that could place us unnecessarily in the cross hairs of thousands of angry constituents yet again.

Moreover, the legislation reported by the Committee grants the FCC the discretion to refrain from applying program exclusivity rules even if such application might protect local broadcasters from the entrance of distant network signals into their local market. Indeed, the FCC could decide not to apply exclusivity rules at all under the legislation as it stands today. Such a determination by the FCC, however, would result in the permanent grandfathering of the illegal transmission of distant network signals—an outcome that this Congress should not endorse.

What makes the approach taken in this legislation all the more imponderous, is its alleged distinction between illegal behavior involving Grade A satellite subscribers and illegal behavior involving Grade B subscribers. With respect to the satellite carriers' transmission of distant network signals to Grade A subscribers, the legislation requires that the illegal transmission should be terminated by a date certain. Yet, with respect to served subscribers residing between the Grade A and Grade B contours, the legislation could legalize the transmission of distant network signals.

We simply cannot support that approach as the best means for helping consumers who may otherwise have had their network signals terminated. Instead, we advocated an alternative during the Committee's consideration of the legislation that we thought provided a better balance in addressing the competing concerns of satellite providers, broadcasters, and consumers. That alternative would have permitted subscribers between the outlines of the Grade A and B contours to continue to receive distant network signals by satellite—regardless of whether they are considered served or unserved—until December 31, 1999. During this grace period, the FCC would have been required to develop a fair and orderly waiver process so that consumers who could not receive local signals would be granted a prompt waiver to permit the delivery of distant network signals by satellite.

Those subscribers deemed to be served under the refined Individual Location Longely-Rice (ILLR) methodology would have their signals terminated as of December 31, 1999. Well before this date, they would receive ample notice of such termination, and their DBS provider would have a significant incentive to retain them as customers. Therefore, they would likely inform subscribers about obtaining over-the-air antennas. Customers deemed to be unserved under the new ILLR model would be permitted to continue to receive their distant network signals after the December 31, 1999, cutoff date.

While our approach provides a date certain for termination of illegally transmitted network signals, it also gives the satellite consumer the proverbial three bites at the apple. First, the utilization of the revised ILLR predictive model will more accurately determine which customers are likely to be able to receive their local network programming over the air. Those deemed unable to receive such programming would be able to continue to receive distant network signals via satellite. Second, those customers who are deemed served by the new model, but who cannot in fact receive clear signals from their local broadcasters, would be afforded access to an orderly waiver process through which they could continue to receive network programming through their satellite provider. Finally, if the request for a waiver is denied, the customer could request testing (to be paid for by industry) at the home to provide a more accurate determination of his or her ability to receive local broadcast signals. This alternative approach provides ample opportunity for consumers who truly cannot receive their local network stations to continue to receive distant network signals. In contrast, the approach approved by the Commerce Committee would either: permanently grandfather the illegal transmission of distant network signals by satellite providers; or facilitate the blacking out of such signals through the imposition of exclusivity rules by the FCC.

In offering these dissenting views, we do not wish to suggest that Congress ignore the necessity for a federal solution to two important problems: (1) the absence of a viable, sustainable competitor to cable in the multichannel video programming marketplace; and (2) the need for a national solution to the ongoing fight between satellite providers and broadcasters over consumers receiving network programming. If these problems remain unaddressed, the multichannel video programming consumer will continue to suffer as cable rates rise and further litigation threatens additional terminations of network programming transmitted by satellites. The agreement on the need to address these problems in the immediate future provided the justification for the Committee to report S. 303 favorably. The disagreement as to how to help customers who may have their network programming terminated in the future required the filing of these minority views.

MAX CLELAND.
JOHN KERRY.
ERNEST HOLLINGS.
TED STEVENS.

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